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HAFEEZ IQBAL OIL & GHEE INDUSTRIES (PVT) LTD v. ALAMI VEGETABLE OIL PRODUCTS SDN BHD

HIGH COURT MALAYA, SHAH ALAM
AZIMAH OMAR J
[ORIGINATING SUMMONS NO: 24-26-01-2013]
B 18 AUGUST 2017

ARBITRATION: *Award – Enforcement – Application for recognition and enforcement of awards as judgments – Preliminary objection – Whether applicant could seek to recognise both final arbitration award and final appeal board award* C *– Whether decision by final appeal board final or concluded award – Whether award to be enforced final award by final appeal board – Whether preliminary objection raised had merit*

ARBITRATION: *Award – Enforcement – Application for recognition and enforcement of awards as judgments – Applicant seeking to recognise final* D *arbitration award and final appeal board award – Whether final appeal board acted outside terms of arbitration – Whether contained decisions on matters beyond scope of submission to arbitration – Whether awards in conflict with public policy of Malaysia – Whether awards consistent with PORAM Rules of Arbitration and Appeal – Whether defendant successfully proved grounds to challenge recognition of* E *arbitral awards – Arbitration Act 2005, s. 39*

The plaintiff, a company based in Pakistan and the defendant, a Malaysian company, through a broker Intra Oil and Fats Sdn Bhd ('Intra Oil'), had entered into an agreement to sell and purchase 10,000 metric tonne ('MT') of RBD Palm Oilen in bulk. Intra Oil had issued an initial contract/sold note F to both the plaintiff and the defendant. A sales contract was subsequently executed between the plaintiff and the defendant to formalise the initial contract/sold note. A dispute, however, arose between the plaintiff and the defendant in respect of the sale and purchase of 10,000 MT of RBD Palm Olein which had resulted in the plaintiff filing a request for arbitration under G the PORAM Rules of Arbitration and Appeal pursuant to item 12 of the initial contract/sold note. In its request for arbitration, the plaintiff had submitted that the defendant had failed to furnish the performance bond to the plaintiff. The defendant took the stance that the terms of the sales contract had clearly and expressly provided that the plaintiff was required to H issue/furnish a letter of credit ('LC') first and upon the issuance of the LC, only then the defendant was required to furnish the performance bond. The plaintiff, however, took the opposite stance that only upon the issuance of the performance bond that the earlier furnished LC would then become operational. Both the arbitration tribunal and the appeal board found in I favour of the plaintiff. The plaintiff, *via* encl. 1 and pursuant to s. 38(1) of the Arbitration Act 2005 ('the Act') applied for an order that the Persatuan Minyak Sawit Malaysia Award of Arbitration Final Award ('final arbitration

award') and the Persatuan Penapis Minyak Sawit Malaysia Final Appeal Board Award ('final appeal board award') be recognised as binding and be enforced by entry as a judgment in terms of the award. The defendant objected to the plaintiff's application and contended that ss. 38 and 39 of the Act did not apply to international arbitration and submitted that the plaintiff's application must be dismissed. The High Court found in favour of the plaintiff and allowed the recognition and enforcement of the final arbitration award and the final appeal board award. The defendant's appeal to the Court of Appeal was dismissed on the grounds that s. 38 of the Act covered international arbitral awards. The Federal Court, however, directed that the case be remitted to the High Court to be heard on its merits of the defendant's challenge under s. 39 of the Act before a new judge. The matter to be determined was whether the defendant had successfully proved any of the grounds under s. 39 of the Act to challenge the recognition of the international arbitral award. The defendant raised a preliminary objection in relation to s. 38 that the plaintiff could not seek to recognise and enforce both the final arbitration award and the final appeal board award. The defendant, in further opposing the recognition and enforcement by the plaintiff, relied on ss. 39(1)(a)(iv) and/or (v) and also ss. 39(1)(b)(ii) of the Act, namely on the following grounds (i) the final appeal board had acted outside the terms of arbitration stipulated in the plaintiff's request for arbitration and/or contains decisions on matters beyond the scope of the submission to arbitration; and (ii) both the final award and final appeal board award were in conflict with the public policy of Malaysia in that they were inconsistent with the PORAM terms and would be unfair to the seller.

Held (allowing plaintiff's application in encl. 1):

(1) There was no merit in the preliminary point raised for the defendant on the ground that even though there were two decisions of the arbitral bodies (namely, the final arbitration award and the final appeal board award), the latter award was delivered by the appeal board as a result of an appeal filed by the defendant against the arbitration tribunal award. Once the appeal board had heard the appeal and delivered its decision, the decision or the award by the final appeal board would be the final award or the concluded award. Hence, the award to be recognised and enforced obviously would be the final award by the final appeal board. (para 27)

(2) The arbitration clause or term was provided under item 12 of the initial contract/sold note. The plaintiff had referred the parties' dispute to the arbitration tribunal pursuant to the arbitration term provided under the initial contract/sold note. The defendant did not take any objection on the arbitration proceedings and as a matter of fact submitted itself within the jurisdiction of the two arbitral bodies even though the sales contract did not provide for an arbitration clause. Thus, the defendant's

contention that the appeal board had acted outside the submission of the arbitration was clearly an afterthought. Item 12 of the initial contract or the sold note not only provided for arbitration but also stipulated that arbitration must be governed by the PORAM Rules and Kuala Lumpur was nominated as the seat of arbitration. (paras 38-40)

(3) The appeal board had dealt with the precise dispute contemplated by the parties and fell within the terms of the submission to arbitration, namely, the issue pertaining to the performance bond being the primary or central issue to the dispute. The final appeal board award did not contain decisions on matters beyond the scope of the submission to arbitration. The appeal board had derived its decision within the scope of submission of the arbitration. Therefore, the contentions of the defendant that the appeal board had exceeded its scope was without merit and therefore must fail. The circumstance in s. 39(1)(a)(iv) and/or (v) of the Act was never proven by the defendant. (paras 44 & 45)

(4) Both the plaintiff and the defendant had voluntarily chosen and agreed to arbitrate their dispute according to PORAM Rules, which provides that the decision of the arbitral tribunal shall be final and conclusive. The defendant was, therefore, estopped from asserting that the award was inconsistent with the PORAM Rules. It is trite law that those who make a contract to arbitrate their dispute should be held to their bargain. (paras 48 & 49)

(5) The defendant had clearly failed to prove that the award was in conflict with the public policy of Malaysia. It is trite law that the contravention of public policy argument ought not to be utilised as a facade to re-open settled matters in the arbitration. The defendant here did not make any application under s. 37(1)(a)(i) to (vi) or under (b)(ii) of the Act. The failure in applying to set aside the award under s. 37 of the Act on the same grounds now attempted to be raised under s. 39 of the Act led to the inescapable conclusion that the issues raised by the defendant in this application lacked *bona fide* intent and was obviously an afterthought. The defendant had ultimately failed to discharge the burden of proof to prove that the defendant's challenges against the recognition under s. 38 of the Act fell within any of the circumstances under s. 39 of the same Act. (paras 52-54)

Case(s) referred to:

Alami Vegetable Oil Products Sdn Bhd v. Hafeez Iqbal Oil & Ghee Industries (Pvt) Ltd [2016] 7 CLJ 19 CA ***(refd)***

Allianz General Insurance Company (M) Bhd & Ors v. Kapar Energy Ventures Sdn Bhd [2016] MLJU 1515 ***(refd)***

Archer Daniels Midland Co lwn. TTH Global (M) Sdn Bhd [2016] 1 LNS 1282 HC ***(refd)***

Berjaya Times Square Sdn Bhd v. M Concept Sdn Bhd [2010] 1 CLJ 269 FC ***(refd)***

Cheah Theam Kheng v. City Centre Sdn Bhd (In Liquidation) & Other Appeals [2012] 2 CLJ 16 CA ***(refd)***

Colliers International Property Consultants (USA) v. Colliers Jordan Lee and Jaafar (Malaysia) [2010] MLJU 650 ***(refd)***

Open Tyre Joint Stock Company Efirnoye ("EFKO") v. Alfa Trading Ltd [2012] 1 CLJ 323 HC ***(refd)***

Legislation referred to:

Arbitration Act 2005, ss. 38(1), (2), 39(1)(a)(i), (ii), (iii), (iv), (v), (vi), (vii)

For the plaintiff - RS Sodhi; M/s Ajit & Co

For the defendant - Gregory Ling & CS Hui; M/s Ranjit Singh & Yeoh

Reported by Suhainah Wahiduddin

JUDGMENT

(Enclosure 1- Application pursuant to s. 38(1) of the Arbitration Act 2005)

Azimah Omar J:

Introduction

[1] This originating summons (encl. 1) relates to an arbitration matter. By its encl. 1, the plaintiff is seeking from this court for an order that the Persatuan Minyak Sawit Malaysia Award of Arbitration Final Award dated 11 February 2009 and the Persatuan Penapis Minyak Sawit Malaysia Final Appeal Board Award dated 24 May 2010 made by the Persatuan Penapis Minyak Sawit Malaysia against Alami Vegetable Oil Products Sdn Bhd, be recognised as binding and be enforced by entry as a judgment in terms of the award.

[2] The plaintiff's encl. 1 is filed pursuant to s. 38(1) of the Arbitration Act 2005 ("Act").

The Background Facts

[3] The plaintiff (Hafeez Iqbal Oil & Ghee Industries (PVT) Ltd) is a limited liability company incorporated under the laws of Pakistan, based in Pakistan.

[4] While the defendant (Alami Vegetable Oil Products Sdn Bhd) is a Malaysian based limited liability company incorporated under the laws of Malaysia.

[5] Through a broker, Intra Oil and Fats Sdn Bhd (Intra Oil), the plaintiff and the defendant had entered into an agreement to sell and purchase 10,000 Metric Tonne (MT) of RBD Palm Olein in bulk.

[6] For confirmation of the said sale of 10,000 MT of RBD Palm Olein in bulk between the plaintiff and the defendant, Intra Oil had on 8 July 2006 issued an initial contract/sold note (RBDOLN/0607018) to both the plaintiff

A and the defendant. The initial contract/sold note (exh. SA-2, encl. 2) contained the detailed particulars of the transaction as well as the terms and conditions of the sale and purchase of the RBD Palm Olein.

[7] It must be noted that item 12 of the initial contract/sold note reads as follows:

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> 12. Other Terms and Conditions
>
> (a) the Seller to provide 2% unconditional Performance upon receipt of pre-advice/draft copy of LC (Already received by Seller on 8/7/2006). Upon receipt of PB buyer shall make LC operative
>
> C (b) Arbitration: Kuala Lumpur as per PORAM Rules.
>
> (c) Seller to appoint SGS as surveyor for quantity and quality.

[8] Two days later namely; on 10 July 2006, a sales contract (No: AV/BLK-1700(M)08 (exh. "A-1, encl. 2) was executed between the plaintiff and the defendant to formalise the initial contract/sold note.

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[9] The term set out in item 12 of the initial contract/sold note with regards to the performance bond and the letter of credit was incorporated in the sales contract in the following terms:

> Payment: 100% Irrevocable LC At Sight With Reimbursement Allowed
>
> E
>
> Validity: LC Will Be Operative Within 3 Working Days Upon Receipt Upon Receipt Of The 2% Unconditional Performance Bond/Guarantee Issued By Seller's Bank.

[10] Dispute arose between both the plaintiff and the defendant in respect of the sale and purchase of 10,000 MT of RBD Palm Olein which had resulted in the plaintiff filing a request for arbitration under the PORAM Rules of Arbitration and Appeal pursuant to item 12 of the initial contract /sold note.

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[11] This court must mention at this juncture that the arbitration clause or term with regards to arbitration provided in item 12 of the initial contract /sold note was not incorporated in the sales contract dated 10 July 2000.

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[12] In its request for arbitration, the plaintiff has described the dispute as follows:

> the seller [the Defendant] has failed to make performance bond due to huge rate jump & finally default no shipment.

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[13] The defendant had however refuted the plaintiff's claim that the defendant had failed to furnish the performance bond to the plaintiff.

[14] The defendant takes the stance that the terms of the sales contract has clearly and expressly provided that the plaintiff was required to issue/ furnish a letter of credit (LC) first and upon the issuance of the LC, only then

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the defendant is required to furnish the performance bond. The plaintiff however, takes the opposite stance that, only upon the issuance of the performance bond the earlier furnished LC would then become operational.

[15] Both the arbitration tribunal and the appeal board found in favour of the plaintiff.

Salient Findings Of The Arbitral Bodies

[16] For easy understanding of the matter at hand, it is apt for this court to set out the relevant findings of the two arbitral bodies below.

(i) The final award of arbitration tribunal

(Exhibit "A-2", encl. 2)

The arbitration tribunal consisted of three arbitrators, namely Vinayak Pradhan, Nakul Rastogi and P.R.Thakore. Arbitration Tribunal delivered its decision on 11 February 2009. It was a split decision wherein Nakul Rastogi and P.R. Thakore found in favour of the plaintiff but Vinayak Pradhan found in favour of the defendant.

The relevant findings:

61.1. .... The Contract was on a shipped weight and quality basis.

61.2. The Respondent was to procure the issuance of 2% Performance Bond.

61.3. It was a condition precedent to the issuance of the 2% Performance bond that the claimant provided a draft/pre-advice letter of credit.

61.4. It was an implied condition of the contract that the draft/pre-advice letter of credit would conform to the terms and conditions of the Contract.

61.5. The obligation for a letter of credit, whether a draft letter of credit or an issued letter of credit, to conform to the terms of the Contract, cannot be satisfied through the seller's assurance that it will order the issuing bank to amend the terms of the letter of credit after the letter of credit is issued and/or the goods are shipped. Accordingly:

61.5.1. The claimant, in evincing an intention to issue a letter of credit that would be on a landed weight and quality basis, anticipatorily repudiated the contract, even though the claimant intended to amend the letter of credit after issue or shipment of the goods, and the Respondent exercised its right to terminate the Contract following this anticipatory repudiation by refusing to issue the Performance Bond; or

(ii) The final appeal board award

The final appeal board consisted of three members namely; Rajendra Navaratnam, Mohamed Abd Majed and Yoong Chow Han.

A (a) At para. 5.2 of the appeal board award, the appeal board had noted that the respondent had appealed against the arbitration tribunal's decision primarily on two grounds.

(1) Whether the Respondent had failed to perform his contractual obligations in not posting a Performance Bond (PB), and
B whether there were circumstances that discharged the Respondent from so posting the Performance Bond; and

(2) Whether the Claimant was in breach of contract by proposing to establish a Letter of Credit (L/C) that provided for payment on the basis of weights and quality final at the port of discharge,
C instead of at the port of loading.

(b) The relevant findings on the first ground of appeal with regards the issuance of the performance bond by the defendant (seller).

The board had referred to both the initial contract/sold note dated the
D 8 July 2006 and the sales contract and had made these findings:

5.9 The appeal Board notes that the Initial Contract was not objected to as to its terms at the time by the Respondent.

5.10 The Appeal Board also finds that the provision in the Sales Contract relating to the provision of the Letter of Credit is not
E inconsistent with that in the Initial Contract.

5.11 It must be presumed that the Sales Contract ought to reflect the agreement of the parties in the Initial Contract, unless there is some evidence that there was further negotiation of these terms between the Initial Contract and the Sales Contract. No such evidence was tendered.
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5.12 Furthermore, as the obligation in the Initial Contract as to the provision of the Letter of Credit had already been performed ("Already received"), it would be unconscionable if the corresponding provision in the subsequent Sales Contract were to be given an interpretation which was inconsistent with that
G in the earlier Initial Contract.

5.12A. Finally, the Respondent's message to the Claimant on 19 July 2006 states as follows:

Thanks for arranging the amendments in the Letter of Credit.

H We are arranging the Performing Bond.

A matter of concern to us is that to date we have not been able to finalise fixture of vessel to carry the cargo in the first week of August 2006.

For reasons of prudence and to avoid disappointments, we
I request that the latest shipment date to be extended to end August 2006.

5.13 This is not a response that would be expected from a party who is anxiously awaiting a Letter of Credit, as is now being contended.

We find this message from the Respondent to the claimant to be the absolute confirmation and agreement of the Respondent as to its understanding of its obligations to provide a Performance Bond as soon as the draft Letter of Credit was tendered.

5.15 *If that is the case, then the draft Letter of Credit which was already received by the Respondent as of 8th July 2006 would have discharged the claimant's initial obligations in respect of the Letter of Credit until the Respondent tendered a Performance Bond, upon which the Claimant would be obliged to tender an operative Letter of Credit within 3 days.*

5.16 The Claimant would therefore be within its rights to declare default if Respondent did not tender a Performance Bond as soon as it received the draft Letter of Credit, as happened in this case.

5.17 There are therefore no circumstances that discharged the Respondent from posting the Performance Bond, and the Respondent therefore fails on this ground of appeal.

(emphasis added)

The Earlier Proceedings

[17] Before this court proceeds to consider the merits of this case, it is pertinent for this court to set out a brief account of the earlier proceedings that took place in relation to the plaintiff's application (encl. 1).

(a) The plaintiff filed its encl. 1 on 7 March 2013. It was filed under the new s. 38 of the Act.

(b) When encl. 1 was called for hearing on 30 May 2013 before Justice Hadhariah bt Syed Ismail, the defendant had objected the plaintiff's application and contended the position that the final appeal award could not be recognised and enforced by reason of the wording of the old s. 38 of the Act. The defendant had argued that the old s. 38 of the Act did not provide for an award for an "international arbitration". In the present case, it is not in dispute that the plaintiff is a Pakistani based company. It was further argued by the defendant that in view of the provision of s. 2 of the Act, the appeal board award is an award of an international arbitration. However, s. 38 of the Act was subsequently amended *via* the Arbitration (Amendment) Act 2011 which came into force on 1 July 2011, wherein the term "domestic arbitration" was replaced with "where the seat of arbitration is in Malaysia".

(c) According to the defendant, the purpose of the amendment in s. 38 the Act is not to extend enforcement to international arbitrations but to provide for situations where the office of the foreign party is in Malaysia

and preponderances of the business or other activities that is the subject of the arbitration takes place in Malaysia. It was the contention of the defendant that ss. 38 and 39 of the Act do not apply to international arbitration. Based on these contentions, the defendant had submitted that the plaintiff's application must be dismissed.

(d) Justice Hadhariah had found in favour of the plaintiff and allowed the recognition and enforcement of the final arbitration award and the final appeal award. It must be made clear that based on the submission of the parties, Justice Hadhariah's decision here is that s. 38 of the Act applies upon international arbitral awards so long as the seat of arbitration is in Malaysia. Nonetheless, Justice Hadhariah's decision at this juncture did not consider the application of s. 39 of the Act as elucidated in the Court of Appeal's decision in *Alami Vegetable Oil Products Sdn Bhd v. Hafeez Iqbal Oil & Ghee Industries (Pvt) Ltd* [2016] 7 CLJ 19; [2016] 12 MLJ 169:

> What was before the learned trial judge was a s. 38 application. What was the complaint before the learned trial judge and before us by the appellant was in respect of the merit of the award, which is irrelevant consideration at the stage of a s. 38 application … The learned trial judge did not deal with a s. 39 of the Act 2005 application.

(e) Dissatisfied, the defendant had filed a notice of appeal in the Court of Appeal appealing against Justice Hadhariah's decision. The Court of Appeal had dismissed the defendant's appeal with costs. The Court of Appeal however further elaborated its stance on the applicability on ss. 38 and 39 of the Act. Briefly, the Court of Appeal held that s. 38 the Act covers international arbitral awards to be put to recognition under the same section. In addition, the Court of Appeal adds that issues on merits of the dispute (that were put in arbitration) cannot be raised at the recognition stage under s. 38 of the Act. The Court of Appeal states that the only challenge that could be raised is the grounds and instances as prescribed under s. 39 of the Act. The Court of Appeal also adds that for such challenge under s. 39 of the Act to be raised, the challenge must be raised *via* a formal application:

> It was not permissible to argue issues relating to the award or merit of the award etc under s. 38 of the Act as the merit of the award could not be an issue under s. 38. Section 38 is a 'recognition procedure' to convert an arbitration award to a judgment and can only be done by the person holding an arbitration award. What was before the court was a s. 38 application which was in respect of the merit of the award, which was irrelevant consideration at the stage of s. 38 application.
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> It was permissible to place such an argument in an application under s. 39 of the Act. For s. 39 to apply, the application must be made by the respondent to the award. The respondent to the award was the appellant and no such application had been filed.

Instead, the appellant had only filed an opposing affidavit stating why the respondent's application should not be allowed. The appeal had no merit and was an abuse of judicial process as the appellant had not taken the argument before the court by a proper application under s. 39 of the Act.

(f) The defendant thereafter applied for leave to appeal to the Federal Court and on 22 October 2015, the Federal Court granted leave on the following questions:

(i) whether or not the Defendant, being part of a group of persons/entities upon whom an international arbitration award had been made against, prior to 1.7.2011, would be allowed to challenge the international arbitration award at the recognition or enforcement stage, i.e. when an application was made pursuant to section 38 of Act 2005?

(ii) whether under the circumstances of this case, the Defendant, being part of a group of persons/entities upon whom an international arbitration award had been made against prior to 1.7.2011, could avail itself of a "passive remedy" as recognised in the Federal Court decision in *State Government of Sarawak v. Chin Hwa Engineering Development Co* [1995] 3 MLJ 237, meaning that it did not have to take the initiative to attack an award, but could simply wait until an application was made to recognise or enforce the award and resist the application then?

(iii) could the circumstances of the present case constitute an additional situation upon which a party in the same position as the applicant (i.e. the Defendant) could avail itself of the "passive remedy" in order to meet the ends of justice?

(g) It is pertinent to note that the Federal Court then had not granted leave to questions regarding the applicability of s. 38 regarding international arbitral awards. It remains undisputed that s. 38 of the Act applies. The questions which were granted leave only pertain to the nature and the manner of challenge that may be raised by the appellant/defendant.

(h) The Federal Court heard the appeal and on 13 October 2016 the Federal Court allowed the appeal with no order as to costs. Both the Court of Appeal decision and High Court decision were set aside (but limited to only questions which were granted leave by the Federal Court). The Federal Court had directed that the case be remitted to the High Court to be heard on its merits of the appellant's challenge under s. 39 of the Act before a new judge. Based on the previous courts' decisions, as well as both parties' respective written and oral submission before this court, it is understood that the task at hand for this court, is to determine the merits defendant's challenge of the recognition of the award under s. 39 of the Act. And this was exactly what was submitted by the parties (particularly by the defendant) before this court. It is essential for this

court to stress that the applicability of s. 38 of the Act is not a live issue in the present case as the Federal Court had not allowed any questions to deter the application of the provision with regard to international arbitral award. It remains that s. 38 of the Act is sufficiently wide to cover international arbitral awards. The only matter to be determined by this court is whether the defendant had successfully proven any of the grounds under s. 39 of the Act to challenge the recognition of the international arbitral award.

(i) It is utterly crucial to be appreciated that the merits dealt with by both of the counsels, and this court is not the exactly the merits of the finding of any of the arbitral tribunal, but the merits of the defendant's challenge within the purview of s. 39 of the Act. And this is exactly in line with the decision of the Federal Court. Even the submission by the defendant is generally tailored to s. 39 of the Act.

[18] Hence, this court now shall determine the plaintiff's application namely; whether or not the plaintiff is able to recognise and enforce the final award and the final appeal award pursuant to the new s. 38 of the Act and most pertinently, whether there are grounds for the refusal of such recognition or enforcement pursuant to s. 39 of the Act.

The Law - Section 38 And 39 Of The Act

[19] The new s. 38 of the Act provides as follows:

Recognition and enforcement

(1) On an application in writing to the High Court, an award made in respect of an arbitration where the seat of arbitration is in Malaysia or an award from a foreign State shall, subject to this section and section 39 be recognised as binding and be enforced by entry as a judgment in terms of the award or by action.

(2) In an application under subsection (1) the applicant shall produce-

(a) the duly authenticated original award or a duly certified copy of the award; and

(b) the original arbitration agreement or a duly certified copy of the agreement.

(3) Where the award or arbitration agreement is in a language other than the national language or the English language, the applicant shall supply a duly certified translation of the award or agreement in the English language.

(4) For the purposes of this Act, "foreign State" means a State which is a party to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards adopted by the United Nations Conference on International Commercial Arbitration in 1958.

[20] Section 38(2) provides that:

In an application under subsection (1) the applicant shall produce-

(a) the duly authenticated original award or a duly certified copy of the award and

(b) the original arbitration agreement or a duly certified copy of the agreement

[21] Section 39 of the Act provides:

Grounds for refusing recognition or enforcement

(1) Recognition or enforcement of an award, irrespective of the State in which it was made, may be refused only at the request of the party against whom it is invoked-

(a) where that party provides to the High Court proof that-

(i) a party to the arbitration agreement was under any incapacity;

(ii) the arbitration agreement is not valid under the law to which the parties have subjected it, or, failing any indication thereon, under the laws of the State where the award was made;

(iii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present that party's case;

(iv) the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration;

(v) subject to subsection (3), the award contains decisions on matters beyond the scope of the submission to arbitration;

(vi) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Act from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Act; or

(vii) the award has not yet become binding on the parties or has been set aside or suspended by a court of the country in which, or under the law of which, that award was made; or

(b) if the High Court finds that:

(i) the subject-matter of the dispute is not capable of settlement by arbitration under the laws of Malaysia; or

(ii) the award is in conflict with the public policy of Malaysia.

A (2) If an application for setting aside or suspension of an award has been made to the High Court on the grounds referred to in subparagraph (1)(a)(vii), the High Court may, if it considers it proper, adjourn its decision and may also, on the application of the party claiming recognition or enforcement of the award, order the other party to provide appropriate security.

B (3) Where the decision on matters submitted to arbitration can be separated from those not so submitted, only that part of the award which contains decisions on matters submitted to arbitration may be recognised and enforced.

C **[22]** It remains as a rule of law that the above s. 38 of the Act provides that a party who had obtained an arbitration award (where the seat of arbitration is in Malaysia irrespective of the award being international or domestic) can apply to the High Court for an order that the award be recognised as binding and be enforced by entry as a judgment in terms of the award or by action.

D **[23]** Meanwhile, s. 39 of the Act expressly provides the numerous instances where such an application for recognition can be refused at the request of the party against whom it is invoked. It is for the party against whom the application is invoked, to produce evidence or proof to the satisfaction of the court that instances under s. 39(1)(a), (i) to (vii) has been established.

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[24] The plaintiff's application is supported by an affidavit in support affirmed by Sheikh Muhammed Ikram a/l Sheikh Muhammed Yaqoob on 30 October 2012.

The Preliminary Objection

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[25] At the commencement of the hearing of the plaintiff's application, the defendant raised a preliminary point in relation to s. 38 that the plaintiff cannot seek to recognise and enforce both the final arbitration award the final appeal award. It was submitted by counsel for the defendant that two decisions by the two arbitral bodies were arrived on different reasoning and awarded different amounts of compensation. Furthermore, the compensation amounts awarded were based on a different calculation/formula.

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[26] It was submitted by counsel for the defendant that if the plaintiff were to recognise and enforce both the final award and final appeal award, such enforcement would lead to confusion as to what was the basis for the award in favour of the plaintiff. Hence, the plaintiff can only seek to recognise and enforce the final appeal award.

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[27] This court finds no merits in the preliminary point raised by counsel for the defendant simply on the ground that even though there are two decisions of arbitral bodies, (namely; the final arbitration award the final appeal award) the latter award was delivered by the appeal board as a result of an appeal filed by the defendant against the arbitration tribunal award.

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Once the appeal board has heard the appeal and delivered its decision, thus the decision or the award by the final appeal board would be the final award or the concluded award. Hence, the award to be recognised and enforced obviously would be the final award by the final appeal board.

The Plaintiff's Case

[28] It was submitted by the plaintiff's counsel that the plaintiff has duly complied with both requirements in this application and is entitled to the order prayed for, until and unless the defendant can bring itself within s. 39 of the Act.

[29] Counsel for the plaintiff submitted that the defendant has not identified in their affidavits of which are the exact provisions of s. 39(1)(a)(i) to (vii) that the defendant is invoking.

[30] Counsel for the plaintiff further submitted that under s. 39 of the Act the defendant is required to prove the grounds of refusal by affidavit evidence. The failure of the defendant to state the specific provision relied upon in its affidavit should appropriately lead the court to dismiss defendant's challenge under s. 39 of the Act. Regarding this contention, counsel for the plaintiff had referred to the case of *Archer Daniels Midland Co lwn. TTH Global (M) Sdn Bhd* [2016] 1 LNS 1282; [2017] 7 MLJ 325.

The Defendant's Opposition

[31] In opposing the plaintiff's application, the defendant filed the following affidavits:

(i) affidavit in reply affirmed by Sultan Alaudin a/l KS Mohamed Ismail on 22 February 2013 (Sultan Alaudin).

(ii) affidavit in reply affirmed by Sultan Alaudin a/l KS Mohamed Ismail on 27 February 2017.

[32] Upon this court's perusal on both affidavits affirmed by Sultan Alaudin in opposing the plaintiff's application, this court wholly agrees with the submission by counsel by the plaintiff that in both of the defendant's affidavits, the defendant did not specifically state or identify the exact provisions of s. 39(1)(a), (i) to (vii) that the defendant is invoking. However, the counsel for the defendant had in para. 29 of the defendant's written submission had submitted that in opposing the recognition and enforcement by the plaintiff, the defendant relies on s. 39(1)(a)(iv) and/or (v) of the Act and also s. 39(1)(b)(ii), namely, the following grounds:

> (i) the final Appeal Board had acted outside the terms of Arbitration stipulated in the plaintiff's Request for Arbitration and/or contains decisions on matters beyond the scope of the submission to arbitration.
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> (ii) both the Final Award and Final Appeal Award are in conflict with the public policy of Malaysia in that they are inconsistent with the PORAM terms and would be unfair to the seller.

A Ground (i): the final Appeal Board had acted outside the terms of Arbitration stipulated in the plaintiff's Request for Arbitration and/or contains decisions on matters beyond the scope of the submission to arbitration

[33] It was submitted on behalf of the defendant that the appeal board had B considered matters outside the terms of the submission to arbitration and this has occasioned a circumstance under s. 39(1)(a)(iv) and/or (v) of the Act. With regards to this ground, counsel for the defendant had submitted the following argument:

(i) the plaintiff in its request for arbitration had requested for arbitration C of the dispute arose between the plaintiff and the defendant under Contract Number: AV/BLK-1700(M)/06 dated 10 July 2006 which was the sales contract.

(ii) it is not in dispute that the sales contract constituted a binding contract between the plaintiff and the defendant and the said sales contract D contained terms and conditions which has been agreed upon between the parties.

(iii) notwithstanding the fact that in the request for arbitration, the plaintiff had only cited that the dispute between the plaintiff and the defendant arose from the sales contract, the appeal board when considering the E appeal before them had referred and considered not only the sales contract but also the initial contract/sold note issued by Intra Oil. The appeal board in this case had found that the said initial contract/sold note constituted the actual binding agreement between the plaintiff and the defendant. The appeal board had gone further to consider cl. 12 F of the initial contract/sold note and concluded that the draft letter of credit which was issued by the plaintiff to the defendant was a sufficient compliance of the plaintiff's obligation to issue letter of credit. Since the plaintiff had issued the letter of credit, it was incumbent on the defendant upon receipt of the letter of credit to G prepare and issue the performance bond.

(iv) the appeal board had therefore derived its decision from the wrong contract namely; outside the sales contract, and hence acted outside and beyond the terms of the submission to arbitration (which only stipulated the sales contract). Consequentially, the award by the H appeal board gives rise to the circumstance under s. 39(1)(a)(v) of the Act.

(v) when the appeal board had considered matters outside the sales contract, the appeal board had gone out the parol evidence rule. The I application of terms or matters outside the sales contract constituted a clear violation of the way in which contracts should be interpreted. On this contention, counsel for the defendant had relied on the Federal Court's decision in the case of *Berjaya Times Square Sdn Bhd v. M Concept Sdn Bhd* [2010] 1 CLJ 269; [2010] 1 MLJ 597.

(vi) the appeal board had no reason to conclude that a "draft" letter of credit was agreed upon by the parties when there was no mention of the word "draft" in the sales contract. Hence, the conclusion that a "draft" letter of credit was sufficient amounted to a material change in the already clear terms of the sales contract.

(vii) when the sales contract provided that the letter of credit or L/C will be "operative within three working days upon receipt of the 2% unconditional performance bond …". It must mean that the letter of credit had to have first been issued before the performance bond. Otherwise, the sales contract would have used the word "issued" rather than "operative".

(viii) even from a commercial perspective, the requirement to furnish a proper letter of credit rather than a mere draft letter of credit is important. In the marketplace, when the abovementioned clause is stipulated, the buyer (in this case the plaintiff) would have to arrange for its bank to issue the letter of credit in favour of the seller/beneficiary (in this case the defendant) and transmit the same *via* SWIFT to the advising bank with instructions to release the letter of credit to the seller/beneficiary upon them posting the two per cent performance bond. Accordingly, it makes no sense for a "draft" letter of credit to be issued when such a "draft" would carry no weight as it did not constitute a formal document (carrying with it the seriousness of the party to commit to the transaction).

(xi) the obligation of the defendant to issue the performance bond only arises when the letter of credit itself was issued by the plaintiff (and not the draft letter of credit). And thus, the decision arrived at by the appeal board is manifestly wrong and must not be recognised or enforced by the court.

Court Analysis And Findings On Ground (I)

[34] The dispute in this matter obviously concerns parties obligation in a contract and primarily in relation of interpretation of contract, namely; whether the plaintiff as the buyer is required to issue the letter of credit first or whether the defendant as the seller is required to issue the performance bond first.

[35] It is the defendant's contention that, since the plaintiff's in its request for arbitration had only cited the sales contract in requesting the dispute be arbitrated by arbitrator, it is incumbent upon both the arbitral bodies to adjudicate the dispute within the confines or the parameters of the sales contract only. According to the defendant, when the plaintiff referred the dispute to the arbitration tribunal by citing only the sales contract, therefore the submission of the arbitration shall strictly be based on the sales contract

and consideration must only be given to the terms and conditions contained in the sales contract. Given that situation, the arbitral bodies should only focus on the sales contract and must not take into account the initial contract or the sold note.

[36] In essence the defendant argues that, when the appeal board in this case had considered the initial contract or sold note in arriving at its decision, the appeal board had gone outside the submission of the arbitration, and therefore has occasioned a circumstance in s. 39(1)(a)(iv) and/or (v) of the Act.

[37] In analysis, this court will first begin by setting out what was covered or provided under the sales contract. The sales contract provides the following particulars:

CONTRACT NO	:	AV/BLK-1700(M)/05	DATE: 10TH JULY 2008
SELLER	:	ALAMI VEGETABLE OIL PRODUCTS SDN BHD	
WE CONFIRM SOLD TO YOU THE FOLLOWING ITEMS DATED 10/07/2006:			
BUYER	:	HAFEEZ IQBAL OIL & GHEE INDUSTRIES (PVT) LTD, PLOT NO.191 & 192, INDUSTRIAL AREA D, ISLAMABAD, PAKISTAN	
INTERNATIONAL BROKER	:	INTRA OILS AND FATS SN. BHD.	
QUANTITY	:	10,000 MT	
COMMODITY	:	RBD PALM OLIEN IN BULK	
PORAM SPESIFICATION	:	FFA (AS PALMITIC	: 0.10% MAX
		....	: 0.10% MAX
		IV	: 58 MIN
		MELTING POINT (ADCB CC 3-25)	: 24 DEG. C MAX
		COLOUR (5% LOVIBOND CELL)	: 8 RED MAX
		CLOUD POINT	: 10 MAX
SHIPMENTS	:	BEFORE 10TH AUGUST 2006	
PRICE	:	USD 450 PMT CNF PORT QABIM, PAKISTAN	
PAYMENT	:	100% IRREVOCABLE, L/C AT SIGHT WITH TT REIMBURSEMENT ALLOWED	
L/C TO BE ESTABLISHED TO BENEFICIARY ALAMI VEGETABLE OIL PRODUCTS SDN BHD.			
BANK DETAILS	:	STANDARD CHARTERED BANK MALAYSIA BERHAD KLANG BRANCH NO. 11, 15 & 17 KEPAYANG, 41050 KLANG, SELANGOR DARUL EHSAN.	
		TEL : 603-3344 1700/ 3344 1170	
		FAX : 603-3344 1770	
		SWIFT : SCBLMYXXXXX	
		ACCOUNT NO. 708-1- ...	

WEIGHT ANALYSIS	:	FINAL AT THE PORT OF LOADING
QUALITY AND QUANTITY	:	FINAL AT THE PORT OF LOADING
ORIGIN	:	MALAYSIA
VALIDITY	:	L/C WILL BE OPERATIVE WITH IN 3 WORKING DAYS UPON RECEIPT OF THE 2% UNCONDITIONAL PERFORMANCE BOND/ GUARANTEE ISSUED BY SELLERS BANK

[38] It must be noted and observed here that the sales contract did not provide a term for arbitration. The arbitration clause or term is provided under item 12 of the initial contract/sold note. In the present case, the plaintiff had referred the parties' dispute to arbitration tribunal pursuant to the arbitration term provided under the initial contract/sold note. The defendant did not take any objection on the arbitration proceedings and as a matter of fact submitted itself within the jurisdiction of the two arbitral bodies even though the sales contract did not provide for arbitration clause.

[39] Here, it is crystal clear that when the dispute was referred to the arbitration tribunal it was pursuant to the initial contract/sold note and this was accepted by the defendant readily and willingly. And on top of that, the defendant who was not happy with the award of the arbitration tribunal had filed an appeal to the appeal board.

[40] In addition to that, this court agrees with the submission of counsel for the plaintiff that the defendant's contention that the appeal board had acted outside the submission of the arbitration, was clearly an afterthought. Item 12 of the initial contract or the sold note not only provides for arbitration but also stipulates that arbitration must be governed by the PORAM Rules and Kuala Lumpur was nominated as the seat of arbitration.

[41] Thereto, this court opines that the defendant cannot be allowed to willy-nilly elect when the initial contract or the sold note should apply or should not apply at its whims and fancies. Upon the defendant submitting itself to the jurisdiction of arbitration by virtue of item 12 of the initial contract/sold note, thus, it entails that the rest of the terms provided under the initial contract or the sold note must also have similar application. Both the arbitral bodies are justified in making reference to both the sales contract and the initial contract/sold note and consider the same. Upholding the same principle, the Court of Appeal in the case of *Cheah Theam Kheng v. City Centre Sdn Bhd (In Liquidation) & Other Appeals* [2012] 2 CLJ 16 had held the following:

> In other words of Sir Nicolas Browne-Wilkinson VC in *Express Newspapers Plc v News (UK) Ltd and Others* (1990) 3 All ER 376 at pp. 383 to 384: There is a principle of law of general application that it is not possible to approbate and reprobate. That means you are not allowed to blow hot and cold in the attitude that you adopt. A man cannot adopt two

A inconsistent attitude towards another: he must elect between them and, having elected to adopt one stance, cannot thereafter be permitted to go back and adopt an inconsistent stance

[42] Be that as it may, it is undisputed that the dispute between the plaintiff and the defendant is primarily in respect of the issuance of the performance B bond by the defendant and the issuance of the letter of credit by the plaintiff. The issuances of the performance bond as well as letter of credit are set out both in the sales contract as well as the initial contract/sold note. Both the sales contract and the initial contract were put before the appeal board for their consideration.

C **[43]** What the appeal board had done in this present case was to consider the initial contract/sold note together with the sales contract and read both documents harmoniously and then conclude an express finding of fact that the documents were consistent.

D **[44]** This court is of the view that the appeal board has dealt with the precise dispute contemplated by the parties and falling within the terms of the submission to arbitration namely, the issue pertaining to the performance bond being the primary or central issue to the dispute as cited by the plaintiff in its the request for arbitration.

E **[45]** It is this court's judgment that that the final appeal board award did not contain decision on matters beyond the scope of the submission to arbitration. The appeal board had derived its decision within the scope of the submission of the arbitration. And therefore the contentions of the defendant that the appeal board had exceeded its scope are without merits and therefore must fail. The circumstance in s. 39(1)(a)(iv) and/or (v) of the Act was never F proven by the defendant.

Court Analysis And Findings On Ground (ii)

Ground ii: both the Final Award and Final Appeal Award are in conflict with the public policy of Malaysia in that they are inconsistent with the G PORAM terms and would be unfair to the seller.

[46] The defendant had contended that the final award and/or the final appeal award are in conflict with the public policy of Malaysia. This court is in agreement with the plaintiff's counsel that the defendant in its affidavits does not state how the final appeal award is in conflict with the public policy H of Malaysia.

[47] The defendant had never raised any issue in their affidavit explaining that the award conflicted with fundamental principles of natural justice, illegality or morality or otherwise offensive to the public policy of Malaysia. The only ground that the defendant had raised was that somehow (though not I explained by the defendant) the award is allegedly inconsistent with the PORAM terms and would be unfair against the defendant.

[48] In the present case, both the plaintiff and the defendant had voluntarily chose and agreed to arbitrate their dispute according to PORAM Rules. The PORAM Rules expressly provide that the decision of the arbitral tribunal shall be final and conclusive.

[49] The defendant is therefore estopped from asserting that the award is inconsistent with the PORAM Rules. It is trite law that those who make a contract to arbitrate their dispute should be held to their bargain. (See: *Allianz General Insurance Company (M) Bhd & Ors v. Kapar Energy Ventures Sdn Bhd* [2016] MLJU 1515)

[50] Coming back to the issue of contravention of public policy, the law requires the defendant to adduce proof that the award is in conflict with the public policy of Malaysia. The defendant here has clearly failed to prove the same. It is trite law that the contravention of public policy argument ought not to be utilised as a facade to reopen settled matters in the arbitration. (See: i. *Colliers International Property Consultants (USA) v. Colliers Jordan Lee and Jaafar (Malaysia)* [2010] MLJU 650; ii. *Open Tyre Joint Stock Company Efirnoye ("EFKO") v. Alfa Trading Ltd* [2012] 1 CLJ 323; [2012] 1 MLJ 685)

[51] The defendant here did not make any application under s. 37(1)(a)(i) to (vi) or under (b)(ii) of the Act.

[52] This court agrees with the plaintiff's submission that if the defendant was indeed serious about their contention (that the final appeal board had acted outside the terms of arbitration stipulated in the plaintiff's request for arbitration and/or contains decisions on matters beyond the scope of the submission to arbitration and that both the final award and final appeal award are in conflict with the public policy of Malaysia) the defendant should have moved the court under s. 37 of the Act to set aside the award which they failed to do.

[53] The failure in applying to set aside the award under s. 37 the Act on the same grounds now attempted to be raised under s. 39 the Act, leads to the inescapable conclusion that the issues raised by the defendant in this application lacks *bona fide* intent and obviously an afterthought.

[54] It is this court's judgment that the defendant in the present case has ultimately failed to discharge the burden of proof to prove that the defendant's challenges against the recognition under s. 38 of the Act falls within any of the circumstances under s. 39 of the same Act.

Court's Decision

[55] Based on the above mentioned reasons, the plaintiff's application in encl. 1 is allowed with costs. This court also orders that the defendant to pay the plaintiff the sum of RM10,000 as costs.